

ORIGINAL

RECEIVED  
SUPREME COURT U.S.  
MARSHAL'S OFFICE  
1983 JAN 17 PM 3 09

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-857

TITLE ORALIA MARTINEZ, AS NEXT FRIEND OF ROBERTO  
MORALES, Petitioner V. RAYMON L. BYNUM, ET AL.

PLACE WASHINGTON, D. C.

DATE JANUARY 10, 1983

PAGES 1 - 59



ALDERSON REPORTING

(202) 628-9300  
440 FIRST STREET, N.W.  
WASHINGTON, D.C. 20001

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -x

ORALIA MARTINEZ, AS NEXT FRIEND :  
OF ROBERTO MORALES, :  
Petitioner :

v. : No. 81-857

RAYMON L. BYNUM, ET AL. :

- - - - -x

Washington, D.C.  
Monday, January 10, 1983

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at 10:52  
a.m.

APPEARANCES:

EDWARD J. TUDDENHAM, ESQ., Hereford, Texas; on  
behalf of the Petitioner.

RICHARD L. ARNETT, ESQ., Special Assistant Attorney  
General of Texas, Austin, Texas; on behalf of the  
Respondents.

- - -

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
EDWARD J. TUDDENHAM, ESQ. on behalf of the Petitioner.	3
RICHARD L. ARNETT, ESQ. on behalf of the Respondents.	29
EDWARD J. TUDDENHAM, ESQ., on behalf of the Petitioners -- Rebuttal.	55

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Oralia Martinez against Raymon Bynum. Mr. Tuddenham, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF EDWARD J. TUDDENHAM, ESQ.

ON BEHALF OF THE PETITIONER

MR. TUDDENHAM: Mr. Chief Justice, and may it please the Court:

This case is in many respects a companion case to last term's decision in Plyler versus Doe. It is another attempt by the state of Texas to exclude unwanted Mexican children from the schools of Texas, and to deter them from migrating to the state.

What the state does here is far less defensible than what it did in Plyler versus Doe. The children that the state is depriving of an education in this case are, in fact, United States citizens. Citizens whose parents are Mexican nationals. But these citizen children have an absolute constitutional right to establish their homes in the United States.

And the mechanism used by the state to exclude these children from school is to define them as non-residents. The statute at issue here states that a child who lives apart from his parents for the purpose of obtaining an education is a non-resident if he is

1 moved apart from his parents in order to obtain an  
2 education.

3 QUESTION: Mr. Tuddenham, where in your brief  
4 is that statute set out?

5 MR. TUDDENHAM: It is set out -- Your Honor, I  
6 believe it's on page 2 of the brief. It's subsection  
7 (d), the section challenged here.

8 But of course, it's precisely children like  
9 Roberto Morales and other children whose parents are  
10 Mexican nationals who must move apart from their parents  
11 in order to obtain the education they need if they are  
12 to participate in American society and exercise their  
13 birthright, their American citizenship.

14 QUESTION: Well certainly, the statute can  
15 serve some legitimate purposes, can't it? I don't  
16 suppose that wealthy parents can live in a poor school  
17 district that doesn't do much in the way of taxing  
18 property and have a constitutional right to have their  
19 child live with a step-sister in a very wealthy school  
20 district.

21 MR. TUDDENHAM: Well, there are several  
22 answers to that. If the child is simply commuting from  
23 one district to another and, in fact, returns at night  
24 to live with its parents, then --

25 QUESTION: No, I'm assuming that the parents

1 don't want to pay the school taxes in the high taxing  
2 district, but they want their child to be educated there  
3 and they're perfectly willing to have the child take up  
4 legal residence with a step-sister.

5 MR. TUDDENHAM: If the child, in fact, moves  
6 and establishes a residence with a sister in another  
7 school district and residence is the criteria for  
8 admission to school, then I should think that that child  
9 would have the right to attend school. But I would  
10 point out that this statute does more than that.

11 The problem with the example you're giving --  
12 and I think it is the essential problem of the case --  
13 is this notion that if a child has a choice between two  
14 districts, there's something somehow wrong with him  
15 choosing one district over another. Well, setting that  
16 problem aside for the moment, that's not what this  
17 statute prohibits.

18 QUESTION: But doesn't the state have a  
19 perfectly legitimate interest in seeing that what you  
20 say the statute doesn't prohibit doesn't happen?

21 MR. TUDDENHAM: The state has an interest in  
22 protecting its schools from excessive problems of  
23 migration, but it can't do that by prohibiting  
24 migration. And I think that the problem that you pose  
25 is really more in the minds of the school administrators

1 than the evidence in this case would demonstrate. In  
2 fact, several states such as New York, Pennsylvania, New  
3 Jersey and Connecticut, and I also believe Colorado,  
4 have statutes that would allow parents to do just what  
5 you have said in your example here.

6 QUESTION: But the fact that New York and  
7 Pennsylvania might allow parents to do this doesn't mean  
8 that Texas, under the Constitution, has to allow it,  
9 does it?

10 MR. TUDDENHAM: Well, I would argue that if  
11 the child has a right to travel and a right to establish  
12 his home in another district, then he can. But --

13 QUESTION: You would argue, then, that if I'm  
14 a parent and live in a very wealthy school district and  
15 my 14-year old child -- rather, I'm a parent who lives  
16 in a poor district but I want my child to go to a  
17 district where there is a good deal better education  
18 because of a high tax rate but I don't want to move into  
19 that district because I don't want to pay the high tax  
20 rate, so I simply farm my child out to a step-sister in  
21 the high tax rate district, that the state can't prevent  
22 that under the Constitution, because a 14-year old child  
23 has a right to travel from one school district to  
24 another?

25 MR. TUDDENHAM: To establish a new home, yes.

1 But, Your Honor, understand that in this case, Texas  
2 doesn't prohibit what you're saying.

3 QUESTION: Do you think the child has a right,  
4 independent of the parent, if the child is  
5 unemancipated, to establish his own residency  
6 independently?

7 MR. TUDDENHAM: Perhaps, again, where there is  
8 a choice between school districts, there might be some  
9 grounds for limitation, although I think if there are  
10 going to be limitations on a child's constitutional  
11 rights as opposed to an adult's, it must have something  
12 intrinsic to do with the child, some disability of the  
13 child.

14 But the state of Texas has made clear that it  
15 does not care whether children move from one district to  
16 another to live with a sister, so long as they can come  
17 up with some other reason for doing it. And --

18 QUESTION: What is the general test of  
19 residency for school purposes in Texas?

20 MR. TUDDENHAM: The only test for school  
21 residency in Texas is de facto residence. There is no  
22 requirement of prior residence, there's no requirement  
23 of intent to remain. All you have to do is be present  
24 in the district, and that goes --

25 QUESTION: What do you cite for that?

1           MR. TUDDENHAM: Well, the statute itself  
2 simply refers to residence, but last year in Plyler  
3 versus Doe the state argued that -- I believe the  
4 example was someone coming from Virginia for six months  
5 could bring their child and stay for six months with the  
6 fixed intention to return to Virginia, and during that  
7 six months they would be --

8           QUESTION: Other than the arguments in Plyler.

9           MR. TUDDENHAM: There is also evidence in the  
10 record, Your Honor, in the school applications that were  
11 submitted as Plaintiff's Exhibit 8. There are a number  
12 of examples there.

13           The one that comes to my mind right now is one  
14 of a mother who sent her child to live with a  
15 grandmother in south Texas for a few months. There was  
16 some problem; the mother just couldn't take care of the  
17 child at that moment, but was going to come and take the  
18 child back to Houston in December after one semester.  
19 That child was admitted as a resident.

20           QUESTION: What do you say the state does  
21 prohibit that it can't?

22           MR. TUDDENHAM: What it prohibits is -- the  
23 state says that a child can establish residence apart  
24 from its parent or guardian for any reason it wants to.  
25 So they have no problem with the capacity of the child

1 to establish residence apart from its parent. It simply  
2 then takes one class of those children and says you  
3 cannot establish residence apart from your parents  
4 because you've come for the purpose of obtaining an  
5 education.

6           And to go back to your question, Justice  
7 Rehnquist, the fact that the state may have a legitimate  
8 concern about children district-hopping, I believe is  
9 the way the respondents referred to it, this statute  
10 doesn't stop that. If a parent has enough money to  
11 obtain a guardianship, or if he can concoct a reason  
12 other than the need for an education, then the child can  
13 transfer.

14           QUESTION: Yes, but I suppose if  
15 district-hopping is what they want they may have a tough  
16 time coming up with a phony reason that passes muster.

17           MR. TUDDENHAM: Well, the district court found  
18 that any reason would suffice; any reason other than the  
19 desire to obtain an education.

20           QUESTION: But if, in fact, the reason is the  
21 desire to obtain an education, I suppose that whoever  
22 decides whether the reason is true or not would make  
23 some inquiry into that.

24           MR. TUDDENHAM: Well, there is inquiry into  
25 what is your purpose for being here. And if the purpose

1 -- very often, in moving from one district to another,  
2 from one state to another, that purpose may represent  
3 educational needs as desperate as Roberto Morales'.

4           What has happened here is Roberto Morales has  
5 no other school that he can attend. He is not being  
6 precluded from choosing one district over another. He --

7           QUESTION: Counsel, may I ask you a question?  
8 Are you making a facial attack on this statute, or as  
9 applied to a particular client?

10          MR. TUDDENHAM: Well, in the district court we  
11 amended our complaint to drop the claim that the statute  
12 is being discriminatorily applied.

13          QUESTION: So you're not arguing that the  
14 statute has been applied discriminatorily, are you?

15          MR. TUDDENHAM: That is correct. But on its  
16 face, --

17          QUESTION: And Judge Garza found as a fact  
18 that it was not being so applied, didn't he?

19          MR. TUDDENHAM: I believe his finding was that  
20 if you had any other reason for getting in, they would  
21 let you in. There was no statistical evidence to show  
22 that --

23          QUESTION: He didn't find any discriminatory  
24 enforcement, did he?

25          MR. TUDDENHAM: That was not presented to

1 him. That issue did not come up. There was no analysis  
2 done of the school applications to show that children  
3 coming from Mexico were excluded more frequently than  
4 children coming from other states or --

5 QUESTION: But on the face of the statute, it  
6 applies equally to children coming from Mexico as it  
7 would to children coming from any other school district  
8 in the state, wouldn't it?

9 MR. TUDDENHAM: Absolutely, it does. But the  
10 legislative history makes clear that the purpose for  
11 this statute was to deter migration. It was not to  
12 control inter-district transfers. It was to deter  
13 migration from Mexico, to keep children whose parents  
14 cannot enter the country from coming here because  
15 they're citizens and obtaining an education.

16 QUESTION: Counsel, I was going to ask exactly  
17 the same question, because I think the record for me is  
18 somewhat confusing as to whether you were making a  
19 facial or an as-applied challenge, and I take it your  
20 answer to Justice Powell is that now you're making a  
21 facial challenge.

22 MR. TUDDENHAM: It is a facial challenge, but  
23 on its face --

24 QUESTION: What do you do, then, about the  
25 boarding house situation?

1           MR. TUDDENHAM: Boarding home situation? The  
2 state could deal with that if that is a problem. The  
3 state could deal with that in any number of less  
4 restrictive ways. Many states, for instance, make the  
5 reasonable assumption that who is providing the care and  
6 clothing for the child is -- in other words, who's  
7 supporting the child -- is a legitimate criteria to look  
8 at to determine the child's residence.

9           And that would be a far less broad definition,  
10 and it would take care of the boarding home problem  
11 because, of course, the boarding home would be a  
12 commercial operation receiving pay from the parents.

13           QUESTION: Does the record show that this  
14 petitioner intends to stay in the United States after  
15 he's been educated?

16           MR. TUDDENHAM: The record states that he  
17 intended to stay until he completed his high school  
18 education. When we submitted that evidence, Roberto  
19 Morales was nine years old and didn't really know what  
20 he wanted to do. Last week when I talked to him he said  
21 he wanted to grow up and be a doctor and live in McAllen.

22           QUESTION: Well, this takes us right back to  
23 the question I think that was implicit in something that  
24 Justice O'Connor asked. Who's boss here, the parents or  
25 the child?

1           MR. TUDDENHAM: I think this has to be looked  
2 at -- it's a family situation. Obviously, when a child  
3 is nine, Roberto Morales may or may not have known what  
4 was in his best interest. His parents, I think,  
5 recognized that since he was a United States citizen and  
6 he was going to live in the United States as an adult,  
7 he had to learn how to speak English. And he couldn't  
8 wait until he was 18 and could make up his mind to move  
9 to the United States and learn English then, because by  
10 then it would be too late.

11           These people are indigent and they cannot  
12 simply move at age 18 and start adult education  
13 classes. So his parents were the ones, I imagine, when  
14 he was nine who, as a family, made the sacrifice to send  
15 their child away so that his life would not be forever  
16 stigmatized by the fact that he did not learn what it  
17 was to be an American citizen.

18           QUESTION: I suppose it's irrelevant, but how  
19 did he happen to be born in the United States?

20           MR. TUDDENHAM: That is not in the record,  
21 although the way this comes up is the parents are either  
22 here temporarily -- Mexican parents are either in Texas  
23 temporarily on visas or they're here illegally. But  
24 when the child is born in the United States, he then  
25 becomes a U.S. citizen.

1           And that brings up an important comparison  
2 between this case and Plyler, because I think what's  
3 going on here, what was in the minds -- or what the  
4 legislative history indicates -- is that the reason  
5 these children are being excluded from school is the  
6 notion that somehow, they really aren't U.S. citizens.  
7 That they were born here because their parents managed  
8 to get across the river, and for that reason, they can  
9 be deprived of the education that is made available to  
10 all other citizens of Texas.

11           QUESTION: What would be your argument if the  
12 child was not a citizen.

13           MR. TUDDENHAM: Well, if he were entering,  
14 say, on a visa, say, if the federal government had  
15 granted him a permanent residence visa --

16           QUESTION: No, not permanent. Suppose they  
17 just let him in to get an education.

18           MR. TUDDENHAM: Well, if he came in legally,  
19 under the federal immigration laws I should think that  
20 there would be a supremacy problem for the state then --

21           QUESTION: Well, you'd be making the same  
22 argument, wouldn't you?

23           MR. TUDDENHAM: If he had entered legally I  
24 would be making the same argument. Now, there would be  
25 the additional argument that if the federal government,

1 in its exercise of its powers of immigration, had  
2 decided that it was all right for this child to enter  
3 the country, then the state could not burden that right  
4 by then saying well, you can come into the country, but  
5 if you've gotten permission to come in to go to school  
6 we're not going to let you in the school.

7 QUESTION: So the fact that this child is a  
8 citizen is rather irrelevant, isn't it?

9 MR. TUDDENHAM: Only that his right is not a  
10 supremacy right of immigration; it's that he is a  
11 citizen. He has a right under the Constitution to enter  
12 this country and live here.

13 QUESTION: Well, it's irrelevant to your  
14 argument. I'm sure it's not irrelevant generally.

15 MR. TUDDENHAM: Well, perhaps if he is  
16 entering illegally for the purpose of attending school,  
17 the state could draw a narrower statute to exclude those  
18 children.

19 QUESTION: Under Plyler?

20 MR. TUDDENHAM: Well, there is a footnote in  
21 Justice Powell's concurrence with respect to if the  
22 child is entering for the purpose of attending school,  
23 then you could make a pretty good logical argument that  
24 excluding him would be consistent with the federal  
25 policy of deterring immigration. That is, if he's

1 , coming by himself because they're the only children  
2 being affected by this statute.

3           But his citizenship is what gives him the  
4 right to come into the country, and that right -- what  
5 I'm arguing is that that right cannot be conditioned  
6 because the state doesn't approve of his reason for  
7 coming here.

8           QUESTION: To what extent do you rely on a  
9 constitutional right to travel?

10           MR. TUDDENHAM: It is our argument that this  
11 case should be reversed based on the same equal  
12 protection analysis utilized in Doe v. Plyler. But  
13 here, this Court should apply strict scrutiny because it  
14 is his fundamental right to travel that is being  
15 burdened, in addition to the fact that he is being  
16 deprived of an education.

17           QUESTION: So you must be taking the position  
18 that a child of three, four, five, six years of age has  
19 the same constitutional right to travel as an adult  
20 citizen.

21           MR. TUDDENHAM: Obviously, children's rights,  
22 to a certain extent, are not co-extensive with an  
23 adult's rights. But what I would submit here is that  
24 there is no reason shown in this record for limiting  
25 Roberto Morales' right to travel.

1           The state of Texas has already decided under  
2 its probate code that there is a responsible adult  
3 taking care of him. His sister is perfectly okay with  
4 the state of Texas. If he is moving from Louisiana or  
5 from Peru, if he comes and lives with his sister, the  
6 state of Texas thinks that's just fine, as long as he  
7 isn't coming for the purpose of attending school.

8           So there's nothing intrinsic about the fact  
9 that he is a child that argues that his right to travel  
10 should be --

11           QUESTION: Texas doesn't object to the right  
12 to travel back to Mexico, does it?

13           MR. TUDDENHAM: No, it does not, Your Honor.  
14 In fact, that's precisely what the state of Texas  
15 suggests. They suggest that there is no deprivation of  
16 education here because Roberto Morales can go back to  
17 Texas. And they recognize that if he does not have an  
18 education, he can't just sit in McAllen on the streets  
19 all day, although he did that for one year.

20           For one year he stayed in McAllen waiting to  
21 become eligible for school. Even though with the  
22 strictest one-year residency requirements which were  
23 struck down in Shapiro and Dunn and in Maricopa County,  
24 he would have qualified as a resident after waiting that  
25 year.

1           But under this statute, he is still called a  
2 non-resident even after five and a half years of  
3 continual residence. He is absolutely indistinguishable  
4 from any other resident in Texas, any other child living  
5 with a custodian, and the sole reason that he's -- his  
6 motive.

7           QUESTION: Do you think that the state has a  
8 legitimate interest in requiring children who are living  
9 apart from their parents to live with a legal guardian  
10 as a pre-condition to admission to public school?

11           MR. TUDDENHAM: The state has a legitimate  
12 interest in assuring that the child lives with a  
13 responsible adult. Absolutely. But the state of Texas  
14 has determined that Roberto Morales' sister is a  
15 sufficiently responsible adult under the state laws.  
16 Now, under --

17           QUESTION: You think it would be valid for a  
18 state to say if the child is living apart from the  
19 parents, we require as a condition of going to school  
20 that the child be living with a legal guardian?

21           MR. TUDDENHAM: It would depend on their  
22 reason for requiring that. If the reason for requiring  
23 a guardian --

24           QUESTION: Well, what can we assume? That the  
25 child might need medical care and might need other

1 permission to be given for various activities, and the  
2 school needs to be able to look to someone who is  
3 legally in a position to do those things.

4 MR. TUDDENHAM: Absolutely, the state has an  
5 interest in doing that. But if the state law will allow  
6 a custodian to do all of those things, as it does in  
7 Texas, then the guardian would not be needed for those  
8 purposes.

9 QUESTION: Does the record show that when this  
10 child was admitted -- what did the sister sign on the  
11 application blank? I assume that Texas has an admission  
12 card.

13 MR. TUDDENHAM: No, there are no admissions  
14 cards. At the time that this child --

15 QUESTION: They have no records?

16 MR. TUDDENHAM: The only records that were  
17 kept were kept by order of the district court, and that  
18 was after Roberto Morales had first applied.

19 QUESTION: Well, what record does the school  
20 have as to who to call up if this child drops dead?

21 MR. TUDDENHAM: Oh, the child is in school now  
22 and they have his sister, Oralia Martinez's, name.

23 QUESTION: As what? Guardian?

24 MR. TUDDENHAM: As custodian.

25 QUESTION: Custodian.

1           MR. TUDDENHAM: I think the way it's referred  
2 to in the statute is person having lawful control.

3           QUESTION: I'm not interested in the statute;  
4 I'm interested in this case. Does this record show what  
5 position she has insofar as the school is concerned? If  
6 she is a legal guardian she's one thing. If she is a  
7 disinterested passerby, she's another thing.

8           MR. TUDDENHAM: So far as the school is  
9 concerned she is not a disinterested passerby.

10          QUESTION: Well, is that in the record?

11          MR. TUDDENHAM: It is in the record that the  
12 state schools accept children who live with relatives,  
13 or friends even.

14          QUESTION: Well, does it show that she signed  
15 as a relative, as a parent, as a substitute parent, or  
16 what?

17          MR. TUDDENHAM: When a child applies to school  
18 -- it's not in the record, but I imagine that they would  
19 get the name of the parent, or whoever the child is  
20 living with, and -- but what I would show the Court is  
21 that it is clear under the statute and through the  
22 applications kept in the -- as Plaintiff's Exhibit A --  
23 that the school districts do admit children if they are  
24 living with non-guardians; with relatives or friends.  
25 And whatever the paperwork the school does to assure

1 that they have the names of those people is done.

2 The district court found, as a finding of  
3 fact, that the sister was entitled to give medical  
4 permission and other kinds of permission for the child.  
5 I know the school has her name now.

6 QUESTION: May I ask you a question? I  
7 understood you to say a moment ago that the child was in  
8 school now. Is that right?

9 MR. TUDDENHAM: That is correct. He is --

10 QUESTION: Is that pursuant to court order, or  
11 how does --

12 MR. TUDDENHAM: It's an injunction pending  
13 appeal. Yes, Your Honor.

14 QUESTION: I had missed that in the papers.

15 MR. TUDDENHAM: He was out of school for a  
16 year and then the injunction came and he was admitted.

17 QUESTION: And the court of appeals left that  
18 injunction in force and has not ruled against you.

19 MR. TUDDENHAM: That is correct.

20 QUESTION: I see.

21 QUESTION: Counsel, you rely on the  
22 fundamental right to travel. Does that mean that in the  
23 United States a child may pick any school district it  
24 wishes to pick, so long as it complies with the  
25 residence provisions of that school district, or has a

1 constitutional right to go there, regardless of where  
2 his parents may live?

3 MR. TUDDENHAM: In the first place, a child's  
4 right to travel is obviously limited by the parents'  
5 wishes.

6 QUESTION: Well, perhaps not in this case, but  
7 there may be many similar cases.

8 MR. TUDDENHAM: But I would suggest to the  
9 Court that that --

10 QUESTION: Let's take my simple question.  
11 Suppose a child lives very close to a state that has  
12 excellent schools. I think Justice Rehnquist suggested  
13 this sort of problem. He lives right close to the  
14 boundary line. By going across, the child can attend  
15 schools of much superior quality. You suggest he has an  
16 absolute right to go?

17 MR. TUDDENHAM: Well, let me answer that first  
18 by saying that is not necessarily the case before the  
19 Court here. The case here is the child has no other  
20 choice.

21 QUESTION: I know. I'm going back to your  
22 statement.

23 MR. TUDDENHAM: Okay. But leaving that aside,  
24 if the parent and the custodian, whoever it is, and the  
25 child have made the decision that this is what is in the

1 best interest of the child, to give up living with his  
2 parents, give up the day-to-day -- the parents giving up  
3 control over the day-to-day upbringing of their child,  
4 then I would think that there would be a strong argument  
5 that the state would have to show a compelling interest  
6 to interfere with that choice.

7           However, that's not the case here. Also, I  
8 would point out that this statute does not stop that in  
9 any way. It only stops that for indigents. If they can  
10 afford a guardianship, they can do it now, and the state  
11 of Texas doesn't care.

12           QUESTION: But you have people here in your  
13 case who are perfectly willing -- if they were willing  
14 to accept the child, the child could attend the  
15 schools. But they elect not to do so.

16           MR. TUDDENHAM: If they were willing to become  
17 guardians.

18           QUESTION: Yes.

19           MR. TUDDENHAM: Even if they were -- there are  
20 problems with the guardianship requirement in Texas in  
21 that it could mean giving up permanent custody of the  
22 child, such that it would require a second proceeding to  
23 get custody of your child back. But even so, the  
24 expenses involved in obtaining a guardianship are  
25 considerable for an indigent. They may, in fact, be far

1 greater than the cost of tuition.

2 QUESTION: Do you have legal aid in this  
3 county?

4 MR. TUDDENHAM: There is legal aid, Your  
5 Honor, but as the people are rejected under -- in  
6 Plaintiff's Exhibit A, the 30 examples of people  
7 rejected, most of those people did not make it to our  
8 doors for help.

9 QUESTION: Are you suggesting that the  
10 fundamental right to travel on which you rely applies  
11 only to indigents?

12 MR. TUDDENHAM: No, it applies to all. I'm  
13 simply pointing out that what your -- the concern of the  
14 Court in terms of people choosing districts is going on  
15 every day right now for everyone but indigents. And I  
16 don't think that recognizing the right of indigents to  
17 move to obtain an education is going to substantially  
18 affect the school districts in this country.

19 QUESTION: I'm not sure I understand why this  
20 is limited to indigents. Supposing you have an American  
21 family living in Mexico City, a very wealthy family, but  
22 they don't like the schools there and they want to send  
23 their wealthy child to this school in this school  
24 district and they have a friend who will take the child  
25 in. The only way they can do that, as I understand it,

1 is have a guardian appointed, and you said well, you  
2 can't do that without severing the parental relationship.

3 MR. TUDDENHAM: They could also pay tuition.

4 QUESTION: But supposing it doesn't happen to  
5 be a private school in this district. They don't have  
6 to -- say they don't want to pay tuition. They want to  
7 go to this school. They have a very good faculty and a  
8 good student body and a good football team. They have a  
9 constitutional right to do it, don't they?

10 MR. TUDDENHAM: Is this a United States  
11 citizen child?

12 QUESTION: Yes. And United States citizen  
13 parents who, for personal reasons, live in Paris or  
14 London or someplace. Don't they have the same  
15 constitutional right that you're talking about here?

16 MR. TUDDENHAM: Yes, they do. And in fact, a  
17 child like --

18 QUESTION: So indigency really has nothing to  
19 do with the case.

20 MR. TUDDENHAM: Well, the only reason that  
21 indigency comes up is that those parents can do that  
22 right now by paying the minimal amount of tuition --

23 QUESTION: But they say they don't want.

24 QUESTION: They don't want to. They'd rather  
25 use their money for something else.

1 MR. TUDDENHAM: If they would rather stand on  
2 their constitutional right, I suppose they could.

3 QUESTION: You would represent them?

4 MR. TUDDENHAM: No, they wouldn't be eligible.

5 QUESTION: But when you said constitutional  
6 right, their constitutional right to travel that I had  
7 put to you before?

8 MR. TUDDENHAM: That's right. The  
9 constitutional right to travel; travel in the sense of  
10 move and to create a home, to live and abide in that  
11 place. Establish your home there.

12 QUESTION: Now, if this Court should decide  
13 that an infant child has no constitutional right to  
14 travel, does that wash your case out?

15 MR. TUDDENHAM: No, I don't believe so because  
16 still, under Doe v. Plyler, this child is being  
17 absolutely deprived of an education in a place where he  
18 lives. The state of Texas can't deport him from  
19 McAllen. They might exclude him from school, but they  
20 cannot deport him. He's a citizen. And under the laws  
21 of Texas he can live with his sister and continue to  
22 live there with his sister.

23 QUESTION: But as a constitutional matter,  
24 could not this particular -- could not Texas require  
25 that if any child is to live separate and apart from his

1 parents, he must have a legal guardian appointed? As a  
2 constitutional matter, could they impose --

3 MR. TUDDENHAM: It would depend on their  
4 reason for doing it. If the sole reason for doing that  
5 was to determine --

6 QUESTION: The reason that Justice O'Connor  
7 referred to, they want to have someone who is legally  
8 responsible for decisionmaking on behalf of the child.

9 MR. TUDDENHAM: If that were the reason I  
10 should think that would be constitutional. But Texas  
11 doesn't need a guardian to do that. Texas has decided  
12 that the custodian is sufficient for that purpose.

13 QUESTION: Well, it's interesting, though,  
14 that you have stipulated in this case that none of these  
15 children live with his or her parents or a legal  
16 guardian, or a person having lawful control of him or  
17 her, on the order of the court.

18 MR. TUDDENHAM: By order of the court.

19 QUESTION: That none of them has a parent,  
20 legal guardian or other person having lawful control of  
21 them under an order of court, living within the school  
22 district.

23 MR. TUDDENHAM: That's the statutory language,  
24 Your Honor. There is a distinction made between a  
25 person having lawful control, which is a sister, a

1 custodian -- and that's accepted by the state of Texas  
2 -- and a person having lawful control by order of  
3 court. There is no such beast under the laws of Texas.  
4 That's a guardian. That's just the statutory language.

5 He is living with a person who has complete  
6 legal authority over him, under the laws of Texas.  
7 There is no question about that. The only reason he's  
8 being excluded from school --

9 QUESTION: Not if -- not contrary to the  
10 wishes of the parents.

11 MR. TUDDENHAM: If it were -- that's right,  
12 that would be a different case. But that's not this  
13 case. The parents here want him to be able to obtain an  
14 education.

15 QUESTION: Do you think your statement is  
16 consistent with the stipulation of fact that Justice  
17 White just read to you?

18 MR. TUDDENHAM: Absolutely. The court order  
19 -- the person having lawful control under order of court  
20 is the statutory language to distinguish that from a  
21 person who simply has lawful control. If you're with  
22 someone under lawful control by order of court, then you  
23 can go to school even if you have the prohibited  
24 motive. If you're simply living with a sister, whom the  
25 state recognizes has lawful control, then you can't go

1 to school if you have the prohibited motive.

2 I'll reserve the rest of my time for rebuttal.

3 Thank you.

4 CHIEF JUSTICE BURGER: Mr. Arnett.

5 ORAL ARGUMENT OF RICHARD L. ARNETT, Esq.

6 ON BEHALF OF THE RESPONDENTS

7 MR. ARNETT: Mr. Chief Justice, and may it  
8 please the Court:

9 I think first we probably ought to straighten  
10 out the history of this provision. It was codified in  
11 1977; however, this is a rule of Texas law that dates  
12 back at least to 1905. It's a rule of American law that  
13 dates back at least to 1851 in what was apparently the  
14 first school residence case in the nation. It was  
15 introduced into jurisprudence by the New Hampshire  
16 Supreme Court at that time.

17 In 1905, the Texas attorney general's opinion  
18 expressly relied on this rule, stating that the child  
19 was not entitled to go to school in a little town called  
20 Rockdale in central Texas if the main purpose of the  
21 child being there was to obtain an education in that  
22 district, and this child did not live with parents or  
23 guardians.

24 He equated the main purpose of being there for  
25 an education with an ostensible residence as opposed to

1 substantial residence.

2           Just to show the dissimilarity of this rule of  
3 law with the rule of law at issue in Plyler versus Doe,  
4 some 15 years later while this rule was still in effect  
5 in Texas, the Texas attorney general ruled that they  
6 also had to admit any illegal aliens in the school. It  
7 didn't matter -- and you'll find that in the record of  
8 the Plyler case, reference to that 1920 decision in the  
9 1975 opinion of the attorney general.

10           In 1973, this question recurred -- the  
11 question in this instant case -- recurred several times,  
12 right on up until 1973 where the attorney general  
13 reviewed all the decision up to date and reiterated that  
14 the test for residence in Texas to go to school is not  
15 domicile, it's not an intent to remain permanently, it's  
16 what is termed a bona fide residence, and a bona fide  
17 residence can be acquired apart from a parent or  
18 guardian if your purpose for residing in that district  
19 and being present in that district is not for the  
20 primary purpose of going to school.

21           And Justice O'Connor, that is the Texas test  
22 of residency and has been now for 77 years at least.  
23 For school purposes.

24           QUESTION: By case law?

25           MR. ARNETT: By administrative

1 interpretation. These were advice from the attorney  
2 general to the Texas -- to the education, to the state  
3 agency, as to what children were required to be admitted  
4 by the various local school districts.

5 QUESTION: Is it a de facto residency?

6 MR. ARNETT: It's not simply de facto. It is  
7 what is termed a bona fide residency, and you see that  
8 occurring throughout the opinions of this court as well.

9 QUESTION: But can you be a bona fide resident  
10 for six months for purposes of getting a free public  
11 education? Somebody who goes temporarily to Texas?

12 MR. ARNETT: Not if your primary purpose is to  
13 obtain an education. But if your primary purpose  
14 happens to be that you need to be there for some other  
15 reason, -- let's say health; you need to go down to  
16 Texas for treatment for six months -- then yes, you  
17 would be admitted to school. And it has been that way  
18 in Texas, as I say, for 77 years.

19 This has been advice to the state  
20 superintendent of education at that time, back in 1905.  
21 This is also stated by the Court of Civil Appeals in the  
22 DeLeon case which also preceded this codification. And  
23 that DeLeon case, also, in that case, the Court of Civil  
24 Appeals for Corpus Christi said that that was really  
25 what they meant to say in Gamboa as well, which Gamboa

1 has some dicta that tends to go the other way.

2 QUESTION: What if parents decide that they  
3 like the public schools in Corpus Christi, Texas and  
4 they decide to move from New Mexico to Corpus Christi,  
5 Texas so their children can attend the public schools  
6 there, and for no other purpose. Is that all right?

7 MR. ARNETT: Yes, Your Honor, that is all  
8 right.

9 QUESTION: Because they're with their parents.

10 MR. ARNETT: Yes, Your Honor, because when  
11 their parents move into that district as a family unit  
12 on another situation where a child resides with the  
13 guardian -- and the reason we have a guardianship  
14 provision is some children need to have guardians.  
15 Application for guardianship in Texas has to specify the  
16 necessity for a guardian's appointment, so it's not at  
17 all clear that the statute can be frustrated in the  
18 method contemplated and suggested by the petitioner.

19 But getting back to your question, you have a  
20 Shapiro type of case there. You have a family  
21 relocating for all purposes. Now, their primary purpose  
22 may be to change school districts, but on the other  
23 hand, --

24 QUESTION: Under my assumption, that is their  
25 only reason.

1           MR. ARNETT: Okay. But at the same time, they  
2 have joined the polity of that district, for 100 percent  
3 of all purposes. They can vote there, they are going to  
4 live there, they're presumably going to work there.

5           QUESTION: They're going to pay the taxes, too.

6           MR. ARNETT: They're going to pay taxes there,  
7 their work is going to support the local economy there.  
8 They as a family unit reside in Corpus Christi, whatever  
9 their reasons are. The parents will be participating in  
10 the local school district or certainly will have the  
11 right to, will be voting for the school board. And to  
12 that extent, that's fully consistent with our concept of  
13 democracy. It doesn't really matter why someone as a  
14 family unit moves there. Children are different.

15          QUESTION: What if the family from New Mexico  
16 doesn't want to move into Texas, but they want to send  
17 their child down there, and they say what's your  
18 tuition, and you tell them and they say, we'll pay it.

19          MR. ARNETT: That's a local option matter.  
20 School districts are not required to allow anyone in the  
21 school.

22          QUESTION: Well, do some districts permit that?

23          MR. ARNETT: I think probably most districts  
24 do it.

25          QUESTION: All right. If you can pay a

1 tuition.

2 MR. ARNETT: That's right.

3 QUESTION: And they would be the only people  
4 who would be paying a tuition; otherwise, it's free,  
5 isn't it?

6 MR. ARNETT: Not necessarily. There can be  
7 transfers from other districts where they don't even  
8 reside -- don't even live in that district but their  
9 parents --

10 QUESTION: They commute.

11 MR. ARNETT: They commute. And districts can  
12 take them under Texas law, subject to a review by the  
13 agency to insure that there is no intentional evasion of  
14 a desegregation order.

15 And I would like to throw that in here,  
16 because if you want to know what this case will really  
17 do in Texas. You will have districts -- you will have  
18 children hopping all over the state to avoid busing  
19 orders.

20 You know, for example, I --

21 QUESTION: You mean if you lose the case.

22 MR. ARNETT: If we lose the case, that's  
23 right. And --

24 QUESTION: You mean we've got to decide busing  
25 again?

1 (Laughter.)

2 MR. ARNETT: No, sir, we don't have to decide  
3 whether -- the propriety of it, but just where a federal  
4 court has ordered it --

5 QUESTION: Did you ever heard of a red herring?

6 MR. ARNETT: Well, Your Honor, I have three  
7 sisters that have kids in different school districts in  
8 Texas. All three of those districts bus children. My  
9 district does not. Now, I think it's folly to consider  
10 that --

11 QUESTION: But busing is not here, is it?

12 MR. ARNETT: Busing is in many Texas school  
13 districts, and --

14 QUESTION: Is busing in this case?

15 MR. ARNETT: Impliedly, it is, Your Honor,  
16 because it is an incentive to change school districts.

17 QUESTION: Impliedly, guns are too, aren't  
18 they? You can imply anything.

19 MR. ARNETT: It certainly will be one of the  
20 common reasons that would be utilized and would motivate  
21 people to change school districts on the part of their  
22 children.

23 There'd be other reasons. If they like the  
24 athletic program.

25 QUESTION: Did this child change because of

1 busing? Did anybody in this district change because of  
2 busing?

3 MR. ARNETT: You'll find nothing in the record  
4 to support many of the statements that have been made up  
5 here, and there's certainly nothing in the record to  
6 answer your question with. There's nothing in the  
7 record to indicate that this child won't get an  
8 education or wasn't getting an education before he came  
9 across the border. When we raised that in our reply  
10 brief, they replied by saying well, but he can't learn  
11 English.

12 So I assume that this enhanced scrutiny that  
13 goes with the right to an education is now going to go  
14 forward to the right to learn English. Is it going to  
15 go forward to the right to take Calculus 2 in another  
16 district? I mean, there must be a stopping point  
17 somewhere, and --

18 QUESTION: Well, I suppose Texas could adopt a  
19 residency requirement for public school purposes that  
20 would require residency in the normal sense of going  
21 with an intent to remain indefinitely. Right? I mean,  
22 isn't that possible?

23 MR. ARNETT: It would be possible. We don't  
24 think that's very wise because that would cut an awful  
25 lot of children out of school who really need to be

1 there.

2 QUESTION: Isn't that what most states do?

3 MR. ARNETT: No, Your Honor, it's not what  
4 most states do. Most states either go a parent or  
5 guardian residence restriction, or parent or guardian  
6 along with the Texas system of allowing custodial  
7 relationships as long as it's not for the purpose of  
8 going to school.

9 In this regard, I'd like to point out --

10 QUESTION: Let me just ask you one more  
11 question in response to your response to Justice  
12 O'Connor. I suppose if a person teaches in college, he  
13 may get a visiting professorship for a year and maybe  
14 wants to move into your district with his children. You  
15 have a college there where he would be teaching for a  
16 year.

17 Now, if there were a domicile requirement of  
18 intent to remain indefinitely, he couldn't meet that,  
19 and yet he would certainly be a bona fide resident, I  
20 suppose, in terms of your statute, for a year, wouldn't  
21 he?

22 MR. ARNETT: That's right. He wouldn't have  
23 any problems. In fact, our statute is -- as we believe,  
24 it's the wisest type of statute you can have because it  
25 lets children go to school where they need to be, but

1 doesn't create state incentives to send them different  
2 places. Otherwise, you do.

3           Now, very, very few states in this nation --  
4 indeed, I haven't found a single case in my research  
5 where they use the wide-open, temporary de facto rule.  
6 And I believe that you will have to go to a rule like  
7 that, as a matter of federal constitutional law for all  
8 50 states in order to strike the Texas statute.

9           Because certainly, if the parents or  
10 guardians-only laws, which are at issue in several other  
11 states, are constitutional, then Texas's more liberal  
12 law, -- or it would seem certainly would be -- or at  
13 least it would take care of the right to travel  
14 question. If the child doesn't have a right -- if the  
15 parents don't have a right to send the child, the child  
16 doesn't have a right to go, for example, in one of these  
17 states that restricts it to parents or guardians only,  
18 to another district other than where his parents or  
19 guardian resides, then that fairly well ends the right  
20 to travel question. It ends any inquiry concerning the  
21 first classification in this statute, and that is  
22 custodians versus guardians or parents.

23           The second classification in this statute  
24 deals with the purpose for the residence. Now, it would  
25 seem that when you are adopting a more progressive,

1 liberal approach than you're required to, that absent a  
2 suspect classification -- and I don't believe there are  
3 any cases in this Court to indicate that the test of  
4 purpose would be suspect -- that should only be reviewed  
5 under a rational basis standard.

6           And I believe that we have -- well, in fact,  
7 the court of appeals said we had a compelling state  
8 interest in this test. And certainly, we have vastly  
9 more than a rational basis to try to prevent students  
10 from jumping all over the state from district to  
11 district, or students coming in across state lines for  
12 only the reason of going to school without their parents  
13 and without a relocation of the family unit and  
14 participation in the democratic process in Texas.

15           QUESTION: Is the amount of the tuition in the  
16 record, that you would have to pay if --

17           MR. ARNETT: This child is paying tuition, by  
18 the way. This idea of an injunction pending appeal is  
19 truly a red herring. The child is attending school  
20 because they posted a bond to cover his tuition.

21           QUESTION: So what is the tuition?

22           MR. ARNETT: The bond they posted was \$1244.  
23 I don't know if the record expressly states what the  
24 tuition is. Normally, it's around \$1000 in Texas school  
25 districts. That's about what they would get from the

1 state, although I think McAllen probably --

2 QUESTION: So this rule really does have an  
3 incidence on people who can't pay the tuition.

4 MR. ARNETT: If the district -- but that's not  
5 the statute.

6 QUESTION: You can move into the district for  
7 an education anytime you want to pay for it.

8 MR. ARNETT: Let me differentiate between the  
9 district's policy of accepting children with a tuition,  
10 and the state statute which denies state funding and  
11 also, does not require the districts to accept children  
12 under these circumstances.

13 The state's statutes, I believe, would not be  
14 in question because of the district's particular policy  
15 of whether or not they pay tuition.

16 QUESTION: I know. But this district's policy  
17 is to accept tuition. This statute is being  
18 administered in this district on the basis that you may  
19 come here solely for an education if you can pay the  
20 tuition.

21 MR. ARNETT: That is undoubtedly correct, Your  
22 Honor. This is also a case where the plaintiffs amended  
23 their pleadings to drop any allegations concerning the  
24 merit of the statute's application in McAllen, and the  
25 attack is on the statute on its face. And the statute

1 on its face does not say a word about tuition. That was  
2 my point.

3 I would question what interest would support  
4 any state statute, even requiring residency, even  
5 requiring this de facto residency. What interest would  
6 a school district have from having a child come in every  
7 day and go to school? What interest would the state  
8 have in preventing that, other than the interests assure  
9 -- that are underneath and underlie 21.031(d)? I  
10 believe it's entirely the same interests.

11 The interests are that the child is part of a  
12 family unit, it is part of the democratic unit of that  
13 locale and are participants in the economy and in the  
14 political process, if they're citizens, for example, and  
15 all of the normal indicia and all the normal attributes  
16 of participating in a democratic system.

17 It's also obviously, to prevent people from  
18 jumping around the state for whatever reasons. It could  
19 be because there's a football powerhouse and this fellow  
20 wants to get a scholarship at Notre Dame, so he wants to  
21 go play for this particular coach that has connections  
22 at Notre Dame. That undoubtedly will arise.

23 There's certainly ample basis under the  
24 statute for the Texas statute, and indeed, the approach  
25 --

1           QUESTION: May I interrupt you for kind of a  
2 general question? Your opponent has said there are  
3 difficulties about getting a guardianship, and if you  
4 have a guardianship even for terminating it. Is it  
5 expensive, and is it as much of a problem as your  
6 opponent indicates? Do you accept his representations  
7 about that?

8           MR. ARNETT: I think it would be fair to say  
9 that every child in McAllen could have a guardian  
10 appointed for him with the amount of money Legal Aid  
11 spent bringing this case up to the Supreme Court.

12           QUESTION: Well, yes, but this is not a  
13 typical --

14           MR. ARNETT: It is not exorbitant. We have  
15 pauper zones in Texas, we have legal services  
16 available. It is not difficult.

17           QUESTION: But is there a procedure for having  
18 a guardian appointed for an indigent?

19           MR. ARNETT: Well, once again, our statutes  
20 require that an application for guardianship show the  
21 necessity for the appointment of a guardian.

22           QUESTION: Supposing in this very case the  
23 sister came in and said she wanted to be appointed the  
24 guardian so the child could go to school.

25           MR. ARNETT: Well, according to the

1 plaintiffs, in one case out of Brownsville, it was  
2 refused on that basis. That was not deemed to be a  
3 sufficient reason. And there are cases from other  
4 states where it's been refused also on that basis  
5 because it's an intentional frustration of the intent of  
6 the residency statute. And --

7 QUESTION: So we should take this case on the  
8 assumption that this child could not have obtained a  
9 guardianship. Of course, I realize it's not an  
10 as-applied case.

11 MR. ARNETT: No, couldn't do that because --

12 QUESTION: We must take the case on the  
13 assumption that there are a significant number of  
14 children who could not get guardianships in Texas but  
15 who want to live with their sisters or some similar  
16 custodian.

17 MR. ARNETT: For the purpose of going to  
18 school? I don't even know if you can be safe in that.  
19 I'm just saying there's been one case where a probate  
20 court refused it. There are no appellate cases on the  
21 subject as to whether this would be deemed sufficient  
22 reason for appointment of a guardian. So that's really  
23 an open question under Texas law.

24 I would argue, if I were, in fact, in state  
25 court on the question and representing a school

1 district, I would argue that the obvious intent of the  
2 legislature is that you don't frustrate the requirements  
3 of the residence statute by letting guardians be  
4 appointed when there's no necessity. And the only  
5 reason they want a guardian is so they can go to school.

6 QUESTION: Does the custodian have the same  
7 decisionmaking authority as a guardian would?

8 MR. ARNETT: No, Your Honor, he doesn't. The  
9 guardian's powers are co-extensive to what we call  
10 managing conservator, which are co-extensive with the  
11 parent. A custodian has a few narrowly-specified powers  
12 granted to him in the statute more out of necessity than  
13 anything else. He has the power to consent for medical  
14 treatment, for example, and that's obviously a necessity.

15 I don't really think that the ability of the  
16 custodian to consent is a major issue in this case. I  
17 don't really believe that's one of the major  
18 underpinnings of the statute -- whether or not the child  
19 is with a responsible adult, and I don't think that will  
20 be the major underpinnings in any state residency  
21 statute because they're all apt to allow the same type  
22 of system.

23 QUESTION: It would seem to me you might have  
24 a problem if an American citizens says I want to live in  
25 this county for whatever reason, I have a right to do

1 that, and I would like to have a guardian appointed who  
2 can make decisions for me because I'm only 12 years old  
3 or 11 years old. And Texas might say well, we won't do  
4 that because a consequence of that might be then you  
5 might get to go to school. Is that your position?

6 MR. ARNETT: Now, I think if he needs a  
7 guardian appointed for him to exercise his rights --

8 QUESTION: Just because he's 12 years old and  
9 that's where he wants to live.

10 MR. ARNETT: And to exercise his rights. Then  
11 he undoubtedly will get a guardian appointed. We even  
12 have a provision for out-of-state residents to have a  
13 guardian appointed where they have property in the state  
14 and some reason for it. So if he just needs a guardian  
15 because his parents are back in Mexico and he seeks a  
16 guardian in order to have someone to represent him  
17 contractually, et cetera in the state, undoubtedly he'd  
18 be able to get one appointed.

19 QUESTION: Even though the only reason he's  
20 there is he hopes after this guardianship has been  
21 appointed, he'd like to go to school there.

22 MR. ARNETT: If they're as clever as you are,  
23 they're going to beat the system.

24 (Laughter.)

25 QUESTION: It doesn't take -- you're not very

1 clever to figure that one out.

2 MR. ARNETT: Well, I just point out that if  
3 the guardian -- if the probate court was satisfied that  
4 the only purpose for the appointment of a guardian was  
5 to establish school residency, I can't promise this  
6 Court that a guardianship would be granted. Now, if he  
7 has some other legitimate reasons, then it's highly  
8 unlikely it wouldn't be granted.

9 It's much the same as Judge Garza and Judge  
10 Case and both district judges that reviewed the facts in  
11 this case and reviewed the reports filed by the district  
12 said, that the way the district applies this, although  
13 it's not before the Court, is quite liberal. And if  
14 they can find another reason for the child to be here  
15 other than to take advantage of school, they'd let him  
16 in. I think the same type of thing is going to --

17 QUESTION: I must confess I have a lot of  
18 difficulty understanding a facial attack on a statute  
19 brought by a litigant, and we don't care how the statute  
20 applies to the particular litigant. It's a very  
21 puzzling constitutional posture for a case of this kind,  
22 for me. Maybe I just have a problem that others don't  
23 have.

24 MR. ARNETT: Well, in terms of the way the  
25 statute applies to this particular litigant even, their

1 argument could only be that the state has a  
2 constitutional duty to discriminate in his favor,  
3 because it seems to me beyond doubt that Texas can avoid  
4 the problems, both short term and long term, in terms of  
5 their effect on school districts and their control, from  
6 students hopping around different parts of the state,  
7 from students going from Dallas out to the suburbs, from  
8 students going from Houston to Austin even. And from  
9 students going from Louisiana into Texas.

10           Although that's interstate travel, it's  
11 certainly not the same type of interstate travel this  
12 Court was dealing with in Shapiro and Gaddis, which  
13 involved a bona fide change in residence on the part of  
14 a family. I don't think it's debatable.

15           QUESTION: In Texas, do you have any problems  
16 from students from any other state other than the  
17 government of Mexico? In Texas.

18           MR. ARNETT: No, there's nothing in the record.

19           QUESTION: Isn't that your only problem?  
20 That's what they told us in this other case.

21           MR. ARNETT: Well, we talked -- that's the  
22 only place where we've got illegal aliens from, Your  
23 Honor. But in terms of the potential for students  
24 coming in, I think you'll find East Texas Guidance  
25 Center versus Brockett deals with students from

1 Louisiana. I think that you'll find that --

2 QUESTION: How many would that encompass?

3 MR. ARNETT: That was a particular child care  
4 institution there.

5 QUESTION: That's A-1, where you have hundreds  
6 and thousands of Mexicans, right?

7 MR. ARNETT: Well, the testimony of the  
8 superintendents in this case was that there will be  
9 thousands come in from interstate or international.  
10 They didn't differentiate. As to the numbers, there's  
11 nothing in the record, Your Honor, to support a  
12 conclusion as to what the major effect of this statute  
13 is.

14 QUESTION: And there's nothing in the record  
15 on hopping, either, is there?

16 MR. ARNETT: There's certainly plenty in the  
17 case law on that.

18 QUESTION: But there's nothing in this case.

19 MR. ARNETT: No, Your Honor, but I would  
20 indicate that --

21 QUESTION: And this petitioner didn't hop to  
22 but one place. He only made one hop.

23 MR. ARNETT: Well, I imagine the other ones  
24 would only make one hop, too.

25 QUESTION: Mr. Arnett, you and Justice

1 Marshall were talking about moving from Mexico to Texas  
2 or from state to state, but this statute applies to  
3 moving from district to district, does it not?

4 MR. ARNETT: Yes, Your Honor. Strictly  
5 speaking, the statute does not relate to interstate  
6 travel at all; it relates to inter-district travel or  
7 coming in -- or actually, it doesn't relate to travel at  
8 all. It relates to the reason for your presence in a  
9 district.

10 Now, you may have been in that district since  
11 you were born, you may have come from a neighboring  
12 district, you may have come from Louisiana, from Mexico  
13 or from Peru.

14 QUESTION: Do states in remote areas so far as  
15 Mexico is concerned have similar laws? What about North  
16 Dakota?

17 MR. ARNETT: Well, for example, New Hampshire  
18 has the same law. North Dakota I'd have to check in my  
19 brief and see which one they have.

20 QUESTION: They have the same law for what  
21 purpose? To keep Mexicans out?

22 MR. ARNETT: Obviously not. Obviously, in  
23 1851 when New Hampshire Supreme Court set this rule, it  
24 was to preserve school districts, and to prevent --

25 QUESTION: Do you deny that this one was to

1 keep Mexicans out?

2 MR. ARNETT: Yes, Your Honor, I deny that.

3 QUESTION: Give me what proof you have.

4 MR. ARNETT: Because it's been a doctrine in  
5 Texas law since 1903.

6 QUESTION: And there were no Mexicans in 1903?

7 (Laughter.)

8 MR. ARNETT: And the case came up in 1905 --  
9 this was at a time that, you have to remember, that the  
10 state also educated any Mexicans that came in and it had  
11 no rules against educating illegal aliens. So on that  
12 basis, I think I'm fairly sound in saying that it was  
13 not aimed at them.

14 The attorney general's opinion concerning  
15 Rockdale makes no mention in 1905 -- apparently, it was  
16 farmers. Now, it does not make a mention as to the race  
17 of the children involved.

18 QUESTION: I thought we had a district court  
19 finding in this case on the purpose.

20 MR. ARNETT: You have a district court finding  
21 that one purpose of the statute was to impede people  
22 coming in from Mexico to go to school.

23 QUESTION: Don't we have to accept that?

24 MR. ARNETT: Well, I think you can look at the  
25 factual underpinnings of it because the district court

1 fell victim to what this Court rejected in O'Brien,  
2 United States versus O'Brien. The district court used  
3 the expression of one, single legislator who was not  
4 even a sponsor of this bill. And when you read what he  
5 said, coupled with the language of the statute, at most  
6 his intention was to do what the statute does, and that  
7 is keep people from coming in --

8           QUESTION: But in the posture that this case  
9 is here, don't we have to accept that finding?

10           MR. ARNETT: No, Your Honor, I don't believe  
11 you do. And also, I would point out that the district  
12 court made another finding, that the main purpose was to  
13 provide a statutory guideline of residency. That was  
14 the district court's first finding on it, and it said a  
15 purpose, one purpose, was --.

16           Now, if you look at the factual underpinnings  
17 of that in order to understand what the district court  
18 was saying, what it was really saying is that we had one  
19 legislator down there in Austin who said this. That's  
20 the evidence. The other legislator whose testimony is  
21 in the record was the sponsor and said primarily, it was  
22 to codify the attorney general opinions.

23           QUESTION: The district court also mentioned,  
24 as I recall, counsel, the state's interest in the tax  
25 burden, so that children couldn't choose districts

1 without having parents or guardians who contributed to  
2 that -- who helped relieve the tax burden. District  
3 court mentioned that, didn't it?

4 MR. ARNETT: The district court has a finding  
5 that children like this do not generally pay taxes, and  
6 the cost of their education will have to be borne by the  
7 bona fide residents of that district.

8 QUESTION: And the district court also  
9 mentioned the importance of school boards being able to  
10 plan from year to year as to pupil-teacher ratio, load,  
11 et cetera, didn't it?

12 MR. ARNETT: He talked about overcrowding, he  
13 talked about the inter-district transfers and how they  
14 would disrupt the educational system. He concluded with  
15 a finding that in all likelihood, if this statute did  
16 not exist it would be detrimental to the educational  
17 standards of the school districts of Texas. And that  
18 finding was affirmed by the Fifth Circuit.

19 Now, I would like to get back to this  
20 motivational approach because it seems to me that that  
21 is a rather interesting point in this case. You don't  
22 have a disparate impact. This statute applies equally  
23 to everyone. It in no way has a different effect on one  
24 group of persons than any other group of persons.

25 As such, it seems to us that United States

1 versus O'Brien, Palmer versus Thompson, Brown versus  
2 Califano which was quoted in the proffered case last  
3 term, all say that you don't look at motive.

4 But in any event, the motive factually, the  
5 district court found the dominant motive was to codify  
6 or to provide a statutory definition of residence.  
7 Previous to that, it had merely been common law as  
8 indicated by the attorney general opinions in the DeLeon  
9 court.

10 Now, we have used in Texas precisely the  
11 standard this Court set forth in Vlandis versus Kline  
12 for determining bona fide residency. This purpose test  
13 was also used in Sosna versus Iowa, it is used in Starns  
14 which was affirmed by this Court, it was set forth in  
15 various decisions of the lower courts on the same issues  
16 such as the Spriggs case and the Zoben case.

17 We have used what we believe to be the best  
18 system. We don't see where Colorado's system is as  
19 good. They require the child to intend to reside there  
20 indefinitely. Well, he may not need to reside there  
21 indefinitely for his health reasons or whatever brought  
22 him there.

23 This also, I would point out, allows us to  
24 have a workable system for the education of handicapped  
25 children. Under a de facto residency approach, which

1 analytically is the only thing one could go to to strike  
2 this statute, and a temporary de facto at that, if  
3 Houston were to place a child in Austin at a residential  
4 facility for the purposes of an education, he's paying  
5 \$100,000 a year, upon his arrival to Austin he'll become  
6 a resident of Austin and Austin will become responsible  
7 for that \$100,000 a year. It doesn't make a lot of  
8 sense.

9           By the same token, -- and that is one reason  
10 we have the disqualification concerning educational  
11 purposes, or that's one end that it serves. On the  
12 other side of the coin, we have things called ICFMRs,  
13 Intermediate Care Facilities for the Mentally Retarded,  
14 where parents place children; they've never taken the  
15 kid to the home district. The home district's never had  
16 a shot to see if they could provide an appropriate  
17 education for this kid, but the kid may be 500 miles  
18 across the state in an ICFMR.

19           By regulation, we have required the district  
20 where that ICFMR is located to provide an education to  
21 those children, so long as they are not there for an  
22 education, primarily for educational reasons.  
23 Otherwise, we would have a very difficult time  
24 delivering services to those children because the  
25 district of responsibility would be 500 miles away and

1 never have seen the child.

2           Our system works very well in Texas for a lot  
3 of different reasons. It works very well in a number of  
4 other areas for a lot of different reasons. It's the  
5 common law of this country in school residency matters.  
6 And we also believe it should be upheld as  
7 constitutional.

8           CHIEF JUSTICE BURGER: You have two minutes  
9 remaining, Mr. Tuddenham.

10           ORAL ARGUMENT OF EDWARD J. TUDDENHAM, Esq.

11           ON BEHALF OF THE PETITIONER -- REBUTTAL

12           MR. TUDDENHAM: Thank you. Just to quickly,  
13 with respect to the facial challenge and the fact that  
14 this is a county residence statute, this complaint in  
15 this case was patterned on Maricopa County versus  
16 Memorial Hospital which was also a facial challenge to a  
17 county residence statute struck down on international --  
18 because it had an effect on interstate travel.

19           In the final minute, I would just like to  
20 reiterate to this Court that --

21           QUESTION: Let me just ask one other question  
22 about that, if I may. Is it correct, then, that the  
23 case as it comes to us is exactly the same as the  
24 hypothetical involving the wealthy family abroad who  
25 want their child to go the school without paying tuition?

1           MR. TUDDENHAM: The plaintiff before the Court  
2 is a child from Mexico; he is the -- this is not a class  
3 action. It's --

4           QUESTION: No, but the issue -- if we're not  
5 concerned with the impact on the particular litigant, is  
6 the constitutional issue is the same as the hypothetical  
7 case I posed?

8           MR. TUDDENHAM: I do not believe so. The  
9 issue before the Court is the facial impact of this  
10 statute on Roberto Morales. That's how it was litigated  
11 in the district court, and that's how it was defended.

12           (Laughter.)

13           QUESTION: I don't understand that.

14           QUESTION: That's hardly a facial attack.

15           MR. TUDDENHAM: Well, that was the way it was  
16 litigated in the district court -- .

17           QUESTION: We could give you all the relief  
18 you wanted by just saying that insofar as this statute  
19 impacts on -- has an impact on your client, it's  
20 unconstitutional. And you would -- is that all you want?

21           MR. TUDDENHAM: Insofar as it prevents  
22 children who have no other choice and who need an  
23 education, this is their only choice for an education in  
24 the United States --

25           QUESTION: But this record --

1 QUESTION: That would include Justice Stevens'  
2 example.

3 QUESTION: Yes, and I don't think this record  
4 shows -- you correct me if I'm wrong -- that this  
5 particular child could not have had a guardian appointed  
6 for him.

7 MR. TUDDENHAM: The record shows that he is  
8 indigent, and a guardian --

9 QUESTION: Well, the record doesn't show that  
10 he ever applied for a guardianship, or had his sister  
11 apply for a guardianship and was turned down.

12 MR. TUDDENHAM: His parents were afraid of  
13 giving up permanent custody of their children.

14 QUESTION: Well, the record doesn't show that  
15 she couldn't have tried that route, does it?

16 MR. TUDDENHAM: But she is indigent and it  
17 requires a bond of up to \$1000 to be posted.

18 QUESTION: Well, they apparently posted a bond  
19 to go to school, according to your opponent.

20 MR. TUDDENHAM: The bond was --

21 QUESTION: We don't know the facts as to the  
22 particular litigant, is what I am saying.

23 MR. TUDDENHAM: Excuse me?

24 QUESTION: We don't know the impossibility of  
25 this litigant attending this school by some other means

1 because you haven't tried out all the aspects of the  
2 impact of the statute on this litigant.

3 MR. TUDDENHAM: But it is clear that this  
4 statute is and was designed to create an expanding class  
5 of American citizens, whose parents are in Mexico who  
6 have no other place they can go to school, but who have  
7 a right even now as citizens to live in the United  
8 States. So, does he live here and not go to school?

9 QUESTION: Well, they can go to school in  
10 Mexico. You just say they won't get the education they  
11 think they'll get in the United States.

12 MR. TUDDENHAM: If I may respond to that,  
13 Justice White, just last year Mr. Arnett, in Plyler  
14 versus Doe, told this Court that there are over four and  
15 a half million children of school age in Mexico who are  
16 not attending school because of inadequate facilities in  
17 Mexico. So there is no guarantee that this child can  
18 get any education --

19 QUESTION: Does that mean that Texas should  
20 support them?

21 MR. TUDDENHAM: Not the children of Mexico,  
22 but this child as a United States citizen. He has a  
23 right to establish a home in the United States today.  
24 He can't be deported by the state of Texas. He has a  
25 right to live there. Thank you.

1 CHIEF JUSTICE BURGER: Thank you, gentlemen,  
2 the case is submitted.

3 (Whereupon, at 1:45 p.m., the case was  
4 submitted.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

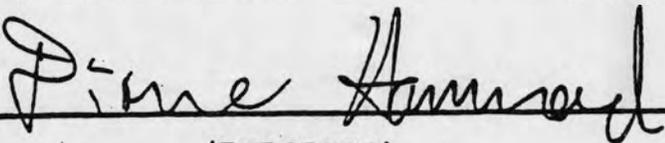
CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

Oralia Martinez, as Next Friend of Roberto Morales, Petitioner  
v. Raymon L. Bynum, et al - No 81-857

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pina Amador", is written over a horizontal line.

(REPORTER)